NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 60/2015
[2015] NZSC 119

BETWEEN	D (SC 60/2015) Applicant
AND	THE QUEEN Respondent

Court:	William Young, Arnold and O'Regan JJ
Counsel:	L L Heah for Applicant J C Pike QC for Respondent
Judgment:	31 July 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal in which it dismissed his appeals against conviction and sentence on 13 counts of historic sexual offending against his two step daughters.[1] If leave is given, the applicant seeks to challenge only his conviction, not sentence.

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1 *D (CA 95/2014) v R* [2015] NZCA 171 (French, Miller and Asher JJ) [*D v R* (CA)].

Background

[2] The complainants, whom we will call R and N, were born in 1984 and 1987 respectively. Twelve counts in the indictment related to incidents of sexual assaults on R between June 1996 and December 1997, when she was aged between 11 and 13 years. The single count in relation to N related to an incident that occurred during the same period when N was aged between 9 and 10 years.

[3] The applicant and the mother of the complainants and their respective children were living in the same household at the time these incidents occurred. R disclosed to her mother that the applicant had been touching her in December 1997 and her mother expressed disbelief. R said that he had also touched N, and this was subsequently confirmed by N. The mother then confronted the applicant who admitted touching the girls inappropriately. However, neither complainant gave any details as to what the applicant had done to them. Shortly after this, the applicant left the household, but he and the complainants' mother began seeing each other again some time later, and eventually R went to the police in 2011. Before her evidential interview, R wrote down her account of what had happened to her and circulated that to N and other family members. N also made a complaint to the police a short time later.

[4] In his evidence at the trial, the applicant admitted that he found children sexually attractive and admitted that he had touched both complainants inappropriately, though not in the manner alleged by the complainants. He denied that the touching involved any of the conduct alleged in the charges against him.

Proposed grounds of appeal

[5] Leave to appeal is sought on the following grounds:

(a) that the Court of Appeal erred in declining to admit evidence of a memory expert, Dr Zajac. It is argued that a miscarriage of justice arose because Dr Zajac's evidence was not adduced at the applicant's trial;

(b) that the Court of Appeal erred in finding that the failure by the trial Judge to give a warning under s 122(2)(e) of the Evidence Act 2006 had not occasioned a miscarriage of justice; and

(c) that the Court of Appeal erred in rejecting the applicant's challenge to the directions given by the trial Judge in relation to propensity evidence.

(i) Evidence of memory expert

[6] The applicant sought to adduce as evidence in support of his appeal in the Court of Appeal evidence from Dr Zajac about the way in which memories are formed and recalled and how memories can alter, or completely new memories can be formed, over time. It was argued that this evidence should be admitted as fresh evidence, or, alternatively, if it was not considered to be fresh evidence it should be admitted due to its cogency.

[7] The Court of Appeal found that aspects of Dr Zajac's evidence were admissible. Counsel for the applicant, Ms Heah, said it should be considered as fresh evidence because trial counsel had been in error in not adducing it. The Court of Appeal rejected this.[2] It noted the focus of the defence case at trial was on collusion rather than on unreliability, and also considered that the Crown case was very strong. If such evidence had been called, the Crown would have called evidence to rebut it. Trial counsel's approach was a valid tactic. Accordingly, the evidence was not fresh. That analysis involved the application of established law to the facts of the case in a manner which does not give any appearance of error.

[8] The Court of Appeal then considered whether the evidence should be admitted notwithstanding that it was not fresh, which it said depended on its materiality to the verdict.[3]

[9] Notwithstanding Dr Zajac's credibility as an expert in memory, the Court of Appeal was not persuaded her evidence might reasonably have led to an acquittal.

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2 *D v R* (CA), above n 1, at [33]–[35].

3 Citing *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

The Court noted the contemporaneous complaints by the complainants in 1997, the admission made by the applicant both in 1997 and at trial, the age of the complainants at the time of the offending (they were not very young children) and the likelihood that if Dr Zajac's evidence had been admitted, a focus of the defence case would have been collusion, which would have detracted somewhat from the proposition that memories had been reconstructed, which was the focus of Dr Zajac's evidence.[4]

[10] Ms Heah argues that a point of importance arises as to the appropriate test for admission of evidence that is not fresh, citing what she describes as inconsistencies between the decision of this Court in *Fairburn v R*[5] and that of the Privy Council in *R v Pora*.[6] She argued the latter involved a less stringent test than the former. But the judgment in *Pora* cites *Lundy*, the case applied by the Court of Appeal. We do not see any inconsistency in these decisions, despite the slight differences of terminology.[7] We do not see this issue as requiring further consideration by this Court.

[11] Ms Heah argued that this Court should address the extent to which jurors are well informed as to the nature of memory, a matter which she said was a point of general or public importance. She took issue with the Court of Appeal's observation that counsel may rely on a jury's experience to suggest that "people are prone to forget, are suggestible, and may reconstruct memories".[8] Even if we accepted that was an issue worthy of consideration, we do not consider that that this case provides an appropriate context for the Court to address it. Nor do we see any appearance of a miscarriage arising from the way the issue was addressed in the Court of Appeal.

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4 *D v R* (CA), above n 1, at [37].

5 *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [35].

6 *R v Pora* [2015] UKPC 9, (2015) 27 CRNZ 47 at [39], citing *Lundy*, above n 3, at [120].

7 *Fairburn*, above n 5, at [35]: "might reasonably have led the jury to return a verdict of not guilty"; *Pora*, above n 6, at [39]: "there is a risk of a miscarriage of justice if the evidence is excluded". In *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31], this Court described a miscarriage of justice as "something capable of affecting the result of the trial".

8 *D v R* (CA), above n 1, at [33].

(ii) Section 122 warning

[12] In his summing up at the applicant's trial, the Judge drew the jury's attention to issues of reliability. He also noted a defence closing submission that the lapse of time between the date of the alleged misconduct and the trial caused difficulties for the defence. But he did not give a warning of the kind contemplated by s 122(2)(e) of the Evidence Act. The applicant's trial took place before the decisions of this Court in *CT (SC 88/2013) v R*[9] and *L v R*,[10] in which this Court emphasised that the view (accepted as correct by the Court of Appeal prior to *CT*) that s 122 warnings were generally unnecessary or inappropriate was incorrect. The Court observed in *CT* that in cases of long-delayed prosecution there will almost always be a risk of prejudice.[11]

[13] The Court of Appeal referred to *CT* and *L v R* and accepted that, on the law stated in those decisions, a s 122 warning should have been given.[12] However, it found that no miscarriage of justice resulted in the present case from the failure to give a s 122 warning. The Court noted the strength of the Crown case and the lack of any evidence that the applicant was disadvantaged in any special way by the loss of contextual details, and therefore prejudiced by the delay. There was an absence of the type of factors casting doubt on the credibility of the complainants that had influenced this Court's decisions in both *CT* and *L v R*.

[14] No point of public importance arises in relation to s 122: this Court has expressed its views clearly in both *CT* and *L v R* and the Court of Appeal applied the law as stated in those cases correctly in determining that a s 122 warning should have been given. We do not consider that there is any risk of miscarriage if we do not give leave on this ground. The Court of Appeal's analysis involved careful consideration of *CT* and *L v R* and its conclusion that no miscarriage arose resulted from the differences between the present case and both *CT* and *L v R*.

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9 *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465.
10 *L v R* [2015] NZSC 53.
11 *CT*, above n 9, at [51].
12 *D v R* (CA), above n 1, at [46].

(iii) Propensity direction

[15] Ms Heah submits that the propensity direction given by the trial Judge was deficient, and the Court of Appeal was wrong to reject this argument. Having considered the direction given by the Judge and the Court of Appeal's analysis,[13] we see no point of public importance arising, nor do we see any risk of a miscarriage if leave is not granted on this issue. This Court has made it clear that no particular form of direction is required in relation to propensity evidence.[14]

Result

[16] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for respondent

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13 At [57].
14 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.